No: 484706
Clark County Superior Court No: 15-1-00218-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID D. JACKSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Superior Court Judge

APPELLANT'S REPLY

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ARGUMENT

Mr. Jackson received ineffective assistance of counsel, and was prejudiced thereby. His attorney failed to consult with an expert witness to prepare a defense to pivotal medical testimony from a State sexual assault expert witness. The prejudice of that error was evident from the record; and its significance was heightened by the fact that the case was such a close one. To the extent possible for an indigent appellant without means to hire an expert or independent attorney for trial-level post-conviction litigation related to ineffective assistance, Mr. Jackson has shown a reasonable probability that the outcome may have been different if not for the deficient performance.

Sufficiency of the Record

> "There can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has."
>
> *Douglas v. California*, 372 U.S. 353, 355 (1963).

The State would like this Court to deny Mr. Jackson relief because it claims that the record is silent regarding the ineffectiveness of his trial counsel. For example, the State argues that the record on review is silent about Mr. Jackson's trial attorney's experience, so the Court should assume that his attorney had the expertise to dispense with consulting a sexual assault expert. (Response, p. 14). It also argues that Mr. Jackson has not shown that there is an expert who could have offered helpful testimony.

(Response, p. 14). Regarding both of these "deficiencies" in the record, the State argues by citation to a dissenting opinion, that this Court should not infer anything favorable to Mr. Jackson from this purportedly silent record.

To the extent that the record is silent, that is due to the fact that the gravamen of this appeal is ineffective assistance of counsel *and* Mr. Jackson lacked the financial means to obtain independent counsel for post-conviction trial-level litigation and certainly could not afford to consult with an expert witness to establish what might have been if his attorney had consulted with one. For Mr. Jackson's appeal to be meaningful, this Court should keep these circumstances in mind when it looks at the relative paucity of the record. Mr. Jackson was in an unenviable and untenable position where he had no government assistance for an attorney or expert to build a more robust factual record after his trial had concluded.

Deficient Performance

> "Whenever the prosecution in a case involving charges of digital penetration and rape of a child is based upon the physical findings of a physician, it is unreasonable for a defense attorney not to consult a sexual expert concerning those findings."
>
> Declaration of Peter Leeming, a California Defense Attorney with more than 20 years of experience, quoted in *King v. Evans*, 621 F.Supp.2d 850, 859 (N.D. Calif. 2009)

Despite its efforts to characterize the decision whether to consult with or call an expert witness as a purely strategic one, the State has failed to

rebut Mr. Jackson's allegation that his trial attorney provided deficient performance. The State's Response claims that "[t]he failure to call a defense expert witness is, likewise, considered strategic." (State's Response, p. 13) (citing *State v. Mannering*, 150 Wn.2d 277, 287, 75 P.3d 961 (2003)). However, the State's Response neglected to give the appropriate context of the *Mannering* quote. In *Mannering*, the Washington State Supreme Court held that "defense counsel's decision not to pursue a duress defense was strategic, so Dr. Trowbridge would not have been called to testify about duress." *Id.* *Mannering*, therefore, does not stand for the proposition that failure to consult with and call a defense expert is per se strategic. In *Caro v. Woodford*, the Ninth Circuit held that counsel's failure to investigate or present expert testimony regarding a defendant's brain injury was not strategic, and could not be excused as a matter of tactical decisionmaking. 280 F.3d 1247, 1255 (9th Cir. 2002).

The decision made by David Jackson's attorney cannot be presumed strategic because there is no evidence that he even consulted with an expert regarding the State's pivotal medical evidence. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) ("We allow lawyers considerable discretion to make strategic decisions about what to investigate, but only *after* those lawyers '*have gathered sufficient evidence upon which to base their tactical choices.*'") (emphasis in original). In *Trodel v. Wainwright*, defense counsel

committed prejudicial ineffective assistance of counsel for failing to consult with an independent expert witness regarding key expert testimony presented by the State. 667 F.Supp. 1456, 1461 (S.D. Fla. 1986). Similarly, in *King v. Evans*, a defense attorney committed prejudicial ineffective assistance of counsel by failing to consult with an expert about the various potential exculpatory causes for injuries to genitalia. 621 F.Supp.2d 850 (N.D. Calif. 2009).

The State seems to argue that a knowledgeable defense attorney is in a position to simply dispense with expert witness consultation in a sexual assault case such as this. It contended that an experienced attorney is "in a better position to effectively determine from his knowledge and past experiences whether a case has an arguable challenge to medical testimony or not." (State's Response, p. 14). This argument was addressed in *Duncan v. Ornoski*, where the Ninth Circuit Court of Appeals wrote, "It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field." 528 F.3d at 1235. The Ninth Circuit further emphasized the importance of defense attorneys consulting with appropriate experts: "Although it may not be necessary in every instance to consult with or present the testimony of an expert, when the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that

matter may constitute deficient performance." *Id.* At least one experienced criminal defense attorney believes that it is essential to consult with an expert witness when the State presents medical evidence in a sexual assault case. Peter Leeming's quote from *King v. Evans*, reproduced *supra*, page 2.

There is nothing to show that Mr. Jackson's attorney made an informed and tactical decision to not consult with an expert witness and not to present expert testimony regarding the nature of and potential alternate causes for the medical findings presented by the State. The complete absence of any cross examination about the nature and possible causes of the medical findings demonstrates defense counsel's unpreparedness. Counsel's performance fell below reasonable standards; and the only remaining question is one of prejudice.

Prejudice

The verdict demonstrates that this was a close case that depended upon the testimony of the State's expert witness. This expert presented uncontroverted medical conclusions that resulted in Mr. Jackson's conviction for the lesser included offense. Had Mr. Jackson's attorney been more effective with the State's expert, the outcome may well have been different.

In *Dugas v. Copelan*, the First Circuit Court of Appeals noted that, when the case is a close one, "the threshold for prejudice is comparatively

low because less would be needed to unsettle a rational jury" 428 F.3d 317, 336 (1st Cir. 2000) (citing *Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.")). It further noted that, "[i]n a close case, the failure of defense counsel to present certain evidence on important issues can be particularly prejudicial." *Id.* at 335-36.

The State claims that showing prejudice regarding counsel's failure to consult with or call an expert witness requires a showing that "he had a viable defense through an expert witness of his own." (Response, p. 15). The State bases this assertion on a tenuous citation to *State v. Garcia*, 57 Wn.App. 927, 934, 791 P.2d 244 (1990). In *Garcia*, Division One held that a defendant's attorney's deficient performance was not prejudicial because he had not presented any evidence showing that he could raise a cocaine psychosis defense. *Garcia* did not involve a situation, as in Mr. Jackson's case, where the State itself was presenting pivotal expert medical testimony and a defense attorney did not even consult with an independent expert in the field to prepare for the State's evidence.

Mr. Jackson is not asking this Court to second-guess an attorney's tactical decision regarding whether to raise some tenuous affirmative defense, as is the situation in *Garcia*. He is asking this Court to reverse his

conviction because his trial attorney did not prepare adequately to refute or rebut the pivotal testimony of the State's expert witness.

Mr. Jackson's trial attorney did nothing to contradict or impeach the State's expert witness on the cause or nature of the medical findings from the sexual assault examination. He approached the State's expert as a lay witness, seeking only to highlight inconsistent statements made by the victim rather than engaging the expert on her medical findings.

Mr. Jackson was acquitted of all counts which depended primarily upon the testimony and credibility of the victim. He was convicted solely of Second Degree Rape by Forcible Compulsion for digitally penetrating the victim. This conviction was supported, almost entirely, by the testimony of the State's sexual assault expert witness. Had Mr. Jackson's trial counsel been more prepared for the State's expert, the result at trial would likely have been different.

Erroneous Admission of Hearsay Testimony

Whether viewed through the lens of an attorney's failure to object, or the trial court's erroneous admission of evidence, the case was dramatically affected in a way that prejudiced Mr. Jackson by the hearsay statements attributed to the victim by the State's sexual assault expert witness. In the larger scheme, it matters little whether the error is attributed to the attorney for Mr. Jackson because the overall question is whether that testimony

should have been admitted at trial. This Court should still assess the propriety of the evidence and its prejudicial effect. In so doing, it will arrive at the conclusion that the record at trial does not support its admissibility and the prejudice caused by admitting the evidence was plainly evident.

Counsel is aware of no case that stands for the proposition that a party which argues against another party's motion in limine has a standing objection to the evidence covered by that motion in limine. Counsel for Mr. Jackson should have asked the trial court to revisit any decision about the admissibility of hearsay statements attributed to the victim after the evidence adduced at trial revealed that there was an insufficient nexus to medical treatment for the statements to be admissible under ER 803(a)(4). This Court can, and should, reverse the conviction based on the improper introduction of that hearsay evidence.

CONCLUSION

Mr. Jackson's Sixth Amendment right to a fair trial was prejudiced because he received ineffective assistance of counsel. His attorney, who performed admirably throughout much of the trial, failed to consult with an expert to prepare for the pivotal testimony of the State's expert witness. His unpreparedness was manifest in the complete absence of meaningful cross examination regarding the expert's medical findings. The jury's verdict reflected the fact that it was persuaded by the uncontroverted expert

testimony. As such, there is a reasonable probability that the attorney's deficient performance affected the outcome of the trial. The admission of hearsay testimony through the expert witness, despite the absence of evidence that it was used for medical diagnosis or treatment, further prejudiced Mr. Jackson's right to a fair trial. This Court should reverse his conviction.

Respectfully Submitted this 19 day of September, 2015.

LAW OFFICE OF BRET ROBERTS, PLLC.

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Attorney for Appellant

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent, v. DAVID D. JACKSON, Defendant/Appellant.	**NO.** 48470-6-II CERTIFICATE OF SERVICE

I certify that on this date I mailed a true and correct copy of Appellant's Reply Brief to the Defendant/Appellant via U.S. Mail, postage prepaid, to:

Mr. David D. Jackson, #387627
Airway Heights corrections Center
PO Box 2049
Airway Heights, WA 99001-1899

I declare under penalty of perjury under the laws of the state of Washington that the foregoing statements are true and correct.

Dated this 21 day of September, 2016, at Port Townsend, Washington.

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PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed David Jackson's Brief of Appellant electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the same through the Court's filing portal to:

Rachael Rogers Probstfeld
Clark County Prosecuting Attorney's Office
CntyPA.GeneralDelivery@clark.wa.gov

Because I filed this brief after 5:00 p.m. on Monday, I have not yet served a copy of Appellant's Reply on David Jackson. A copy will be mailed to him tomorrow and a separate proof of service filed thereafter.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Port Townsend, Washington, on September 19, 2016.

Bret Roberts, WSBA 40628
Attorney for David Jackson

LAW OFFICE OF BRET ROBERTS, PLLC

September 19, 2016 - 9:09 PM

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